In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-61

PETER K. YONAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his actions in soliciting and receiving "kickbacks" from a supplier of his employer did not constitute fraud as a matter of law, and that he was improperly denied a severance requested on the ground that a co-defendant's defense was hostile to his own.

After a joint jury trial in the United States District Court for the Northern District of Illinois, petitioner and two co-defendants, Greensphan and George, were convicted of eighteen counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner was sentenced to three years' imprisonment. The convictions were affirmed on appeal (Pet. App. A; *United States* v. *George*, 477 F. 2d 508 (C.A. 7)).[1]

[1] Petitioner's co-defendants have petitioned separately for review of the judgment below. See *George* v. *United States*, petition for certiorari pending, No. 73-39; *Greensphan* v. *United States*, petition for certiorari pending, No. 72-1610.

The material facts are set forth in the opinion of the court of appeals (Pet. App. A, pp. 2a-4a; 477 F. 2d at 510-511). Briefly, the evidence showed that from 1961 until 1971 petitioner was employed by the Zenith Radio Corporation as a cabinet buyer. His duties included price negotiations with prospective vendors of cabinets for Zenith's products. In 1966, petitioner was assigned to obtain a supplier for Zenith's new "Circle of Sound" cabinets. Petitioner obtained but one bid, that of Accurate Box Corporation, a company owned by petitioner's friend and eventual co-defendant Greensphan. Accurate set its price to reflect a 10% profit margin, the maximum which Zenith would permit.

In October 1967 petitioner asked Greensphan for a kickback of $1 per unit on every Circle of Sound cabinet sold to Zenith. Greensphan complied. The kickbacks were paid through a complicated series of transactions involving one George, a friend of petitioner and Greensphan, who owned A & G Woodworking Co. Although neither George nor A & G performed any services with regard to the Circle of Sound, it was arranged that A & G would bill Accurate Box Corporation for commissions on the units and that A & G would in turn make payments to petitioner. To disguise the kickback, Accurate's records reflected the payments to A & G as a 3.4% commission on the overall Zenith order, rather than as fixed, per-unit commissions. The Circle of Sound line proved to be highly successful, and, in a three-year period, Greensphan's company paid more than $300,000 in commissions to George's company, and George wrote checks payable to petitioner in amounts totaling in excess of $100,000.

Zenith's conflict-of-interest policy prohibited its purchasing employees from accepting gratuities from sup-

pliers. Petitioner twice signed documents reflecting his recognition of that rule. This policy was also called to the attention of major suppliers, including Greensphan, in annual letters from Zenith.

1. Petitioner argues here, as in the court of appeals, that the kickback money came from Greensphan and not from Zenith and that, since Zenith expressed no dissatisfaction with the Circle of Sound cabinets or with petitioner's performance in regard to the product, the government failed to prove fraud as a matter of law. The court of appeals, in an opinion on which we rely, correctly pointed out that the government was not required to prove that the victim of a scheme to defraud suffered an actual loss (Pet. App. A, p. 8a; 477 F. 2d at 513).[2]

Petitioner's reliance on *Epstein* v. *United States*, 174 F. 2d 754 (C.A. 6), is misplaced, because in *Epstein* the government was unable to show that the defendants had not acted in good faith and for the benefit of the corporations which they directed. Their only breach was the failure to disclose a possible conflict of interest (*id.* at 768-769). The court in *Epstein* expressly distinguished cases where the success of the scheme is dependent upon its concealment (*id.* at 767).

In the instant case, it is plain that petitioner's kickback plan was capable of fruition only because Zenith was unaware of it. The scheme clearly contravened Zenith's conflict-of-interest policy, and it was to conceal the facts from Zenith that the complicated payment system had to be devised. Nor does petitioner's attention to the quality of Accurate's product show, as petitioner implies,

[2] Petitioner does not deny that the mails were used in the conduct of the scheme.

that he was actually a loyal employee of Zenith. Meticulous quality control was very much in petitioner's interest, since it would prevent his superiors at Zenith from becoming suspicious and initiating an inquiry into petitioner's relationship with Accurate.

2. Petitioner also contends that the district court erred in denying his request for a severance, which was based on the theory that defendant Greensphan's defense was antagonistic to his own. Greensphan claimed that the kickbacks had been paid out of fear that he would otherwise lose Zenith's business. Petitioner's defense rested primarily on the theory that the kickbacks did not amount to fraud upon Zenith. As the court below noted (Pet. App. A, pp. 11a-12a; 477 F. 2d at 515), petitioner failed to show substantial prejudice as a result of the joint trial, since the defenses were not actually opposed to one another. Nor, in any event, do antagonistic defenses necessarily entitle the defendants to separate trials. See *United States* v. *Barber*, 442 F. 2d 517, 530 (C.A. 3), certiorari denied *sub nom. Mowbray* v. *United States*, 404 U.S. 846; *United States* v. *Meyer*, 404 F. 2d 254 (C.A. 9), certiorari denied, 394 U.S. 989. Cf. *United States* v. *Abrams*, 357 F. 2d 539, 549 (C.A. 2), certiorari denied, 384 U.S. 1001.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.